Supreme Court, U.S.
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No. 99-872

In The

Supreme Court of the United States

EUNICE M. HILL,

Petitioner,

v.

KANSAS CITY AREA
TRANSPORTATION AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petitioner was a public transportation bus operator who worked for respondent. For the past ten (10) years, petitioner attempted to control her hypertension with medication prescribed by her personal physician. Petitioner admits that she suffers no side effects from taking hypertension medication. However, she claims to have suffered from negative side effects on two (2) occasions when she took pain medication for a temporary injury in combination with her hypertension medication. As a result of this alleged side effect, petitioner claims to be covered by the Americans with Disabilities Act of 1990, as amended ("ADA"). 42 U.S.C. §§ 12101, *et seq.*

A. PETITIONER HAS FAILED TO ADVISE THE COURT THAT SHE CONTROLLED THE MANNER IN WHICH SHE TOOK HER MEDICATIONS.

Petitioner was treated for hypertension by her personal physician. When petitioner took her medication, how much medication she took and the type of medication she took were decisions that were solely between petitioner and her personal physician. Respondent was not advised of any of the foregoing decisions. It was petitioner's contention in the lower courts that the combination of her hypertension medication and pain medication caused the negative side effect of sleeping while on duty on two (2) separate occasions.

The first such incident occurred after petitioner took pain medication immediately before she began her work shift, along with her hypertension medication. Although petitioner claims that she suspected the cause of the

incident was the medications she was taking, she did not tell her supervisor that these medications caused her to fall asleep, nor did she consult with the physician who treated her hypertension to determine the cause or ask her supervisor if she could obtain a referral to the physician who treated her first on-the-job injury. The petitioner was warned that a second sleeping incident would lead to her discharge. Several months later, the second sleeping incident occurred. On this occasion, the petitioner again took the above-referenced medications immediately before she started her work shift. However, unlike the first incident, petitioner took medication that she had been instructed to discontinue. In addition to the first type of pain medication and without any physician's advice, she also took a second type of pain medication. Thus, Petitioner has failed to advise the Court that she controlled the manner in which she took medications and misused the pain medication prescribed.

B. PETITIONER HAS FAILED TO ADVISE THE COURT THAT SHE RECEIVED THE ACCOMMODATION OF CONSULTING WITH A PHYSICIAN.

Petitioner's claimed accommodation was to be referred to a physician for a drug screen in order to determine whether the interaction of her hypertension and pain medication was the cause of the two (2) sleeping incidents. Petitioner did not raise the possibility of any drug interaction or make this request until after the second sleeping incident and notification that she would be discharged. Accordingly, petitioner did not request a disability accommodation; she asked for a second chance to

control her medication. Of equal significance, when petitioner asked if she could obtain a referral to the physician who prescribed the pain medication for her second on-the-job injury, she was advised that her hypertension physician would be in a better position to make this determination. Petitioner was given the opportunity to present her suspicions and any relevant medical evidence at the discharge hearing which was held almost thirty (30) days after her discharge. Even though petitioner received ample time to gather relevant evidence, petitioner failed to present any evidence at the discharge hearing that the combination of her hypertension medication and pain medication was the actual cause of the two (2) sleeping-on-duty incidents. As a result, respondent's discharge decision was upheld.

C. PETITIONER MISSTATES THE BASIS OF THE DISTRICT COURT AND EIGHTH CIRCUIT OPINIONS.

The Eighth Circuit and United States District Court for the Western District of Missouri held that petitioner's request for an accommodation was untimely and unreasonable. Petitioner has not addressed those points in her request for a writ of certiorari. Both lower courts held that petitioner and the physician who prescribed her pain medication were in the best position to determine if she had negative side effects from both medications she was taking. Petitioner did not need respondent's permission to consult with her personal physician. The lower courts also held that petitioner had the obligation to make an accommodation request in a timely manner (before the

second incident that resulted in her discharge) or provide assurance that the accommodation would work.

REASONS FOR DENYING THE WRIT

This case does not present novel facts for the Court to consider and there is no split among the circuits. The decisions of the United States District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals were correct and petitioner's factbound claim must fail. In spite of this Court's stated inclination in *Murphy v. United Parcel Service*, ___ U.S. ___, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999) and *Sutton v. United Airlines, Inc.*, ___ U.S. ___, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999) to review a case where the side effects of medications can cause an individual to become substantially limited, the facts of this case do not merit that type of consideration. The decision in this case is in line with the majority of circuits discussing whether individuals are qualified under the ADA when they make unreasonable and timely accommodation requests.

A. PETITIONER'S REQUEST WAS NOT REASONABLE OR TIMELY AND THAT WAS THE BASIS OF THE LOWER COURT'S DECISION.

Petitioner misstates the basis of the United States District Court and Eighth Circuit opinions. Neither court held that petitioner's request to obtain a drug screen was unreasonable under the referenced statute and regulation. In discussing the reasonableness of petitioner's request, the lower courts determined that she did not

need respondent's permission to consult with the physician who prescribed her hypertension medication. App. A at 5a, App. B at 17a. Therefore, petitioner did not need respondent's permission to implement the proposed accommodation of a drug screen. When that fact is coupled with petitioner's ability to avoid taking her pain medication immediately before the start of her work shift, it is apparent that petitioner was trying to shift her own health care to the respondent. As a result, the District Court and the Eighth Circuit were correct in reasoning that petitioner's argument was "fatally flawed." App. A at 5a, App. B at 16a.

Petitioner has also failed to discuss the timing of her alleged accommodation request. The lower courts held that petitioner could not wait until she was discharged for a second violation of respondent's sleeping-on-duty policy before coming forward with an accommodation request. App. A at 5a, App. B at 16a. The belated timing of the request, coupled with the lack of assurance that the proposed request would actually remedy her problem of sleeping while on duty, were the primary reasons the lower courts were not inclined to view petitioner's request favorably. *Mole v. Buckhorn Rubber Products*, 165 F.3d 1212, 1218 (8th Cir. 1999).

Petitioner cites *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998) and *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999) and references the fact that in both cases the employees received medical evaluations. However, both cases posed a different question than the present case because respondent was unaware that petitioner was experiencing side effects from medication until after she had received notice of her discharge.

The lower courts' opinions are simply a recognition that it was petitioner's responsibility to ask for a reasonable accommodation in a timely manner.

Respondent's actions after petitioner's discharge are also of significance. Petitioner was given an additional thirty (30) days after her discharge to prove her drug interaction claim. Yet when petitioner had her discharge hearing, she failed to come forward with any supporting evidence. Petitioner's discharge was not formalized until after the hearing had occurred. These facts do not portray an employer that has acted in a discriminatory manner towards an employee's claimed disability. Petitioner was actually provided with the accommodation she now seeks, yet that accommodation failed to produce any evidence of her claimed condition.

B. THERE IS NO CONFLICT BETWEEN THE NINTH AND EIGHTH CIRCUITS IN INTERPRETING THE ADA BECAUSE THEY REVIEWED DIFFERENT LEGAL AND FACTUAL ISSUES.

Petitioner contends that the Eighth Circuit's decision is in conflict with the Ninth Circuit's decision in *McAlindin, supra*. The facts and circumstances of this case can be distinguished from the facts and circumstances of *McAlindin*. There is no actual conflict between the circuits. Unlike the District Court decision in *McAlindin*, the United States District Court and Eighth Circuit in this case did not end their inquiries with determinations that there was no act of discrimination because the employer disciplined all employees who fell asleep at work. Instead, in this case, the lower courts conducted the

required individualized inquiry and determined that the respondent did not discriminate against petitioner because of a disability. Petitioner's hypertension was not a disability because it was controlled by medication. App. A at 4a.

Petitioner never claimed that the side effects of hypertension medication caused a disability under the ADA. Rather, petitioner claimed that the combination of medications caused drowsiness. As previously stated, decisions concerning when, how much and whether petitioner took hypertension medication in combination with her pain medication were clearly within petitioner's control. At no time did the petitioner allege that she was compelled to take the combined medications immediately before she started her work shift. Secondly, the bases of the lower court decisions were that petitioner's request was not timely and not reasonable. The plaintiff in *McAlindin* made a timely and reasonable accommodation request which should have been considered by his employer.

Further, at no point in the record did the plaintiff in *McAlindin,* state that he was not qualified to perform the essential functions of his position. The petitioner in this case made several representations to the Social Security Administration that she was totally disabled. In making its individualized inquiry, the District Court and the Eighth Circuit reviewed petitioner's numerous Social Security disability filings. In those filings, she portrayed herself during the applicable time period as an individual who could not perform the essential functions of her bus operator position or any other position. In her response to respondent's motion for summary judgment, petitioner

did not provide an adequate explanation for her previous admissions regarding her health. *Cleveland v. Policy Management Systems*, 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999). All of these considerations indicate that there is no conflict between the Eighth and Ninth Circuits.

C. THIS CASE DOES NOT INVOLVE NOVEL FACTS OR A LEGAL ISSUE THAT SHOULD BE DECIDED BY THIS COURT.

Because this case does not involve novel facts or legal issues, the Court should not grant petitioner's writ of certiorari. Petitioner has tried to convert the facts of this case into the factual patterns of *Murphy* and *Sutton*, which were previously considered by this Court. However, unlike the plaintiffs in *Murphy* and *Sutton*, the facts of this case demonstrate that petitioner made an untimely and unreasonable accommodation request, in spite of whether she experienced any negative side effects from the medication she was taking. Petitioner claims that the lower courts failed to abide by the individualized inquiry doctrine prescribed by *Murphy* and *Sutton*. Under that doctrine, lower courts and employers must determine whether the mitigating measures taken for a potential disability have caused a negative side effect. The factual distinction in this case is that petitioner did not experience any negative side effects from medication she took for a potential disability. To the contrary, she took a combination of medications, none of which was for a potentially disabling condition. Temporary conditions are not covered by the ADA because they are not substantially limiting. 42 U.S.C. § 12102(2). Neither *Murphy* nor

Sutton involve a claim of temporary disability due to the negative side effects from taking different types of medication.

Petitioner also cites the case of *Taylor v. Phoenixville School District,* 184 F.3d 296 (3rd Cir. 1999), for the proposition that an employer must attempt to accommodate the negative side effects of medication taken for a disability. Apart from several factual distinctions, the *Taylor* opinion is not so limited because it states that both parties have a duty to jointly participate in the accommodation process. *Id.* at 312. Further, the *Taylor* opinion clearly articulates the requirement that an employer's obligation is not triggered until the qualified individual requests a reasonable accommodation. *Id.* at 311-15. In this case, the employer was not advised of the petitioner's need for an accommodation until after she was informed of her discharge. In fact, the lower court opinions in this case are consistent with *Taylor* because they held that the petitioner failed to jointly participate in the accommodation process. As stated in *Taylor,* a party that obstructs or delays the accommodation process is not acting in good faith and may be acting in bad faith. *Id.* at 312.

Petitioner also believes that the lower courts' analysis in this case differs from the opinion in *Taylor.* Petitioner believes that the lower courts placed a requirement on employees to avoid taking medications that produced side effects. Although the timing of the plaintiff's medication was not discussed in *Taylor,* in this case it was established that the petitioner could have taken her medication at a different time and avoided experiencing any of her claimed negative side effects while she was at work.

Likewise, the *Taylor* opinion did not discuss the reasonableness of the plaintiff's accommodation request. In this case, both lower courts determined that petitioner could have implemented the accommodation herself (consulting with her personal physician to determine if a drug interaction concern was present) before she committed the second incident of sleeping while on duty. If the petitioner could have implemented the accommodation, any such request to the respondent would be unreasonable. Both lower courts properly held that the petitioner was in a much better position to determine whether she was affected by the medication she was taking. By conducting the individualized inquiry mandated by *Sutton* and *Murphy*, the lower courts determined that the petitioner's theory of recovery lacked merit.

Beyond the factual and legal omissions in petitioner's brief, adopting petitioner's extension of *Murphy* and *Sutton* would have serious implications. Congress enacted the ADA to level the playing field for disabled individuals because of a perception that employers were making employment decisions based on unfounded stereotypes. Specifically, the ADA prevents an employer from discriminating against a qualified individual with a disability because of his/her disability. 42 U.S.C. § 12112. Employers do not violate the ADA unless they know about the disability and refuse to implement a reasonable accommodation in light of that knowledge. 42 U.S.C. § 12112(b)(5)(A). Under petitioner's requested extension of *Murphy* and *Sutton*, respondent would be liable for violating the ADA for simply knowing that she had controlled hypertension. Should this Court adopt petitioner's argument, employers would be faced with liability at

every turn because employees would be covered by the ADA on one day but not be covered on the next. The only difference between coverage and exclusion under the ADA is whether an employee with a controlled medical condition decided to take pain medication. The effect of this interpretation is to ignore the "because of" and "knowledge" requirements of an ADA discrimination case. 42 U.S.C. § 12112; 42 U.S.C. § 12112(b)(5)(A). In this case, petitioner did not inform her employer until her discharge of the suspicion that her two (2) sleeping incidents were caused by the pain medication she was taking.

There are additional problems with petitioner's requested "on again off again" coverage under the ADA. If she is only covered under the ADA when she takes pain medication, then the ADA and its regulations provide employers with little guidance. The ADA requires that employees be substantially limited in their ability to perform the essential functions of jobs. 42 U.S.C. § 12102(2). In considering whether a condition is substantially limited, the ADA requires consideration of the nature, severity, duration and impact of the alleged impairment. 29 C.F.R. § 1630.2. The adoption of petitioner's extension negates consideration of the "duration" of the alleged impairment. In fact, because petitioner could have alleviated the effects of the pain medication on her working conditions by taking it at another time or by possibly changing to another prescription, her condition could only be viewed as temporary and, therefore, not covered by the ADA. 29 C.F.R. § 1630.2(j).